



**Consumers for
AFFORDABLE
Health Care
COALITION**

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*Advocating the right to health care
for every man, woman and child.*

June 19, 2006

VIA U.S Mail and Electronically

Alessandro A. Iuppa, Superintendent
Attn: Vanessa J. Leon
Docket No. INS 06-900
Maine Bureau of Insurance
34 State House Station
Gardiner, ME 04333-0034

IN RE: REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY DIRIGO HEALTH
FOR THE SECONDDASSESSMENT YEAR (2007)

Dear Superintendent Iuppa:

Please find enclosed for filing in the above captioned matter, two (2) copies of the following documents from Consumers for Affordable Health Care (C.A.H.C.) :

SUBMITTED BY: Joseph P. Ditré, Legal Counsel to Consumers for Affordable Health Care

DATE: Monday, June 19, 2006

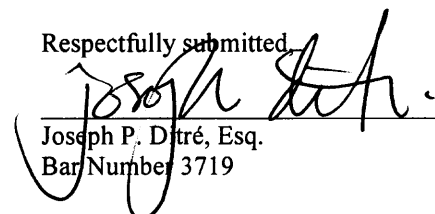
DOCUMENT TITLE: C.A.H.C. Motion for Leave to Serve Informational Request and / or present evidence

DOCUMENT TYPE: Informational Request

CONFIDENTIAL: No

Thank you for your attention in this matter.

Respectfully submitted,



Joseph P. Ditré, Esq.
Bar Number 3719

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RECEIVED
2006 JUN 19 PM 1:19
MAINE BUREAU
OF INSURANCE

Pc: Service List (by US Mail and electronically)

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)	
MEASURABLE COST SAVINGS)	
DETERMINED BY DIRIGO HEALTH)	CAHC Motion For Leave
FOR THE SECOND ASSESSMENT YEAR)	to Serve Informational
)	Request And / Or Present
)	Evidence
)	
Docket No. INS-06-900)	

Pursuant to Sub-section E of the Superintendent's Notice of Pending Proceeding and Hearing, Consumers for Affordable Health Care ("CAHC") hereby requests leave to serve a limited information request upon the Dirigo Health agency and/or to present additional evidence.

Background

As more fully set forth in the June 6, 2006 Decision of the Board of Directors of the Dirigo Health Agency, the time limitations under which the agency and the Board acted precluded the introduction, at the hearing before the Board, of complete evidence in support of the determination of aggregate measurable cost savings. Thus, some savings were actually estimates based upon assumed data.

Nevertheless, the parties to this proceeding explicitly recognized that subsequent to the Board's determination, additional information would be forthcoming and would be presented to the Superintendent. See Transcript of the April 7, 2006 Hearing before the Honorable Donald H. Marden, Justice of the Superior Court, attached hereto, and submitted at the Board proceeding below as CAHC Exhibit #1. See e.g. p.50, lines 18-25; p. 47, lines 3-15; p.60, lines 7-17.

In addition, both at the hearing before the Board and in the deliberations of the Board, both witnesses and the Board itself stated that the information presented was preliminary and would need to be supplemented in order for the Superintendent to make his determination as to whether the Board's determination was "reasonable." See, e.g., "Dirigo Health Savings Offset Payment Year 2 Methodology Supplement" : Record ("R"). 1077, 1079, 1080, 1086-1088, 1101-1103, R.1051, Lines 227-228; 236-269; 415-419; R. at 1057; 1058-59; 1066 Lines 421-426; R. 1066; R. 5220; R. 5520-221; R. 5032; R. 5050; R. 4980.

The Board also noted in its Decision that the determination of "savings from CMAD is based upon available date and recognizes that there may be additional data available to include in the calculation when the Superintendent of Insurance undertakes his review of the Board's determination." Board Decision at n.5

The Superintendent in his Review of Aggregate Measurable Cost Savings Determined By Dirigo Health For The First Assessment Year permitted the introduction of evidence which was not previously presented to the Board. While the Board's proceeding for Year 2 was far more extensive than the Year 1 proceeding, nevertheless full and complete information, which is now available, should, in fairness to the parties, to the public and to insure the integrity of this process, be now considered.

Finally, as was done in the First Assessment Year proceeding before the Superintendent, additional analysis of the respective parties' evidence is essential to a full and fair process. Thus, for example, the Chamber presented evidence and testimony at the Board Hearing which was given only cursory attention, given the Board's compressed time schedule. One piece of evidence, which was scarcely mentioned at the hearing, has turned out to be crucial to the Board's Decision. Specifically, as noted at Page 14 of the Decision, The Board ended up placing substantial reliance upon Chamber Exhibit #21, Table 7 showing a 3 year median growth rate of 4.7%. The Board's use of this Exhibit resulted in a substantial reduction of savings in CMAD, as compared with the amount that the Agency's expert witness had previously presented.

For the reasons set forth above, CAHC seeks leave to obtain new evidence, i.e. evidence which was not previously available, which DHA now has in its possession and which is highly relevant to the determination which the Superintendent must make. The evidence is not repetitious since it has not been previously presented. The evidence will not delay the proceedings since it is readily available.

Information Request

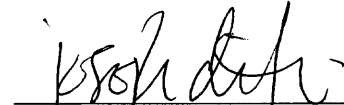
The information sought from the Dirigo Health Agency is as follows:

1. Any expert analyses and/or reports, produced subsequent to the hearing before the Board and which is relevant to the Board's Decision dated June 6, 2006 regarding the calculation of CMAD, specifically the use of a 3-year median rate of growth as compared to a 3-year average rate of growth as set forth in Chamber Exhibit #21. CAHC believes that the DHA currently has in its possession such a report or analysis, that such evidence will demonstrate that use of the median as used in Chamber's Exhibit #21 does not provide a reasonable basis upon which to determine savings in CMAD. Furthermore, the analysis presents a means to determine what methodology is reasonable to determine CMAD. Therefore, the report is highly relevant to the issue before the Superintendent.
2. New information in the possession of the DHA which information was not available at the time of the hearing before the Board and that is relevant to the calculation of CMAD, CON/CIF, and the Uninsured. Included within this request are any analyses of that new information. It is CAHC's understanding that this information and analysis is currently

available, is not repetitious of previously presented evidence, i.e. it is new evidence, and that this new evidence will demonstrate additional savings in these areas.

Dated: Monday, June 19, 2006

Respectfully submitted,



Joseph P. Ditré Esq., Bar #3719
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Certificate of Service

I, Joseph P. Ditré, Esq., certify that the foregoing **C.A.H.C. Motion for Leave to Serve Informational Request and/or Present Evidence** was served this day upon the following parties via U.S. mail and electronically.

Alessandro A. Iuppa, Superintendent

Attn: Vanessa J. Leon
Docket No. INS-06-900
124 Northern Avenue
Gardiner, ME 04333-00034

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Christopher T. Roach, Esquire

Pierce Atwood, LLP
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Tom Sturtevant, Jr.

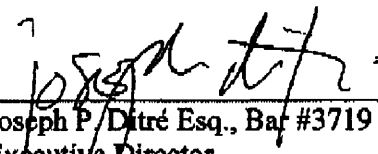
Assistant Attorney General
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Augusta, ME 04333-0006

Compass Health Analytics, Inc.

Attn: John Kelly
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Portland, ME 04101

Dated: Monday, June 19, 2006

Respectfully submitted,



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CONSUMERS FOR AFFORDABLE HEALTH CARE
EXHIBIT # 1

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
Civil Action
Docket No. AP-06-26

MAINE ASSOCIATION OF
HEALTH PLANS, et al.,
Plaintiffs,

V

DIRIGO HEALTH AGENCY
BOARD OF DIRECTORS,
Defendant.

HEARING

BEFORE:

The Honorable Donald H. Marden
Justice of the Superior Court

Kennebec County Courthouse
95 State Street
Augusta, Maine

April 7, 2006
9:40 A.M.

COPY

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APPEARANCES:

FOR THE PLAINTIFFS: CHRISTOPHER T. ROACH, ESQ.
MICHAEL D. FRINK, ESQ.
BRUCE C. GERRITY, ESQ.
WILLIAM H. STILES, ESQ.

FOR THE DEFENDANT: ELIZABETH J. WYMAN, ESQ.
JOSEPH DITRE, ESQ.

Janette L. Cook
Official Court Reporter

<p style="text-align: center;">3</p> <p>1 THE COURT: Thank you, please be seated. 2 Good morning. 3 MS. WYMAN: Good morning. 4 MR. ROACH: Good morning, Your Honor. 5 THE COURT: A familiar cast of 6 characters, if you will excuse the expression. 7 Good morning again. I think probably for 8 starters we ought to enter our appearance for 9 the record, so that that is clear. If the 10 petitioners would start, please. 11 MR. ROACH: Good morning, Your Honor, 12 Chris Roach from Pierce, Atwood on behalf of 13 petitioner Anthem Health Plans of Maine. 14 THE COURT: Thank you. 15 MR. FRINK: Good morning, Your Honor. 16 Michael Frink from Curtis, Thaxter on the behalf 17 of the Maine Association of Health Plans. 18 MR. GERRITY: Good morning. Bruce 19 Gerrity on behalf of Maine Automobile Dealers 20 Insurance Trust. 21 THE COURT: Thank you. 22 MR. STILES: Good morning. William 23 Stiles from Verrill, Dana, here on behalf of the 24 Maine State Chamber of Commerce. 25 THE COURT: Thank you.</p>	<p style="text-align: center;">5</p> <p>1 there was a briefing of the issue of final 2 agency action. The reply brief of the 3 petitioner was received I guess yesterday, I saw 4 it first this morning. It seems to make clear 5 that they are proceeding on the basis of Sub 2 6 of 11,001, which in effect is challenging the 7 failure or refusal of the agency to act. 8 And recognizing that I haven't digested 9 all of the key details of the issues that have 10 been presented, but it appears, then, that the 11 question before the Court as a threshold 12 question is whether the Court has jurisdiction 13 under 11,001, Sub 2, and if so, what the 14 standard of review should be. I believe Mr. 15 Ditre has suggested that there must be a showing 16 of irreparable harm, at least he has briefed 17 that issue. 18 So I guess I would first ask petitioner, 19 whomever wishes to be the spokesman in this 20 regard, to address the issue of jurisdiction. 21 MR. ROACH: Yes, thank you, Your Honor. 22 As previously indicated, Your Honor, my 23 name is Chris Roach, I'm from Pierce, Atwood and 24 I'm here on behalf of petitioner, Anthem Health 25 Plans of Maine. If I could, Your Honor, I'd</p>
<p style="text-align: center;">4</p> <p>1 MS. WYMAN: Good morning, Your Honor. 2 Elizabeth Wyman, I'm an assistant attorney 3 general, I'm here on behalf of the Dirigo Health 4 Board. 5 MR. DITRE: Good morning, Your Honor. 6 I'm Joe Ditre and I'm serving as counsel for 7 Consumers of Affordable Health Carriers. 8 THE COURT: Good morning, Joe. 9 MR. DITRE: Good morning. 10 THE COURT: Okay. The record should be 11 clear on this matter, which is AP 2006-26, that 12 this is pretty of much an -- an expedited 13 proceeding and for that reason did not notice 14 anyone to be responsible for addressing the 15 merits of the underlying case but to simply 16 address the procedural issues. Some of the 17 material that has been submitted does address 18 the underlying case, which is helpful, I'm not 19 complaining, but I -- I -- I think I need to 20 make it clear that I'm not holding any -- any 21 party to this being the determinative hearing 22 for that purpose. 23 There's been an issue raised as to 24 whether or not the Court has jurisdiction under 25 Title 5, 11,000, of the APA, and originally</p>	<p style="text-align: center;">6</p> <p>1 like to briefly go through four different areas 2 that I would like to discuss with the Court this 3 morning, because I think it may be helpful for 4 context. 5 In the first instance to talk about why 6 it is that the petitioners are here and what 7 relief we're seeking, because I think that's 8 related in part to the jurisdictional question. 9 Secondly, to go through the jurisdictional 10 issues that have been raised. Our intention is 11 to be rather brief in that regard because I 12 think our reply lays out in great detail why it 13 is that we think that they -- that the 14 respondent DHA board is looking at the wrong 15 piece of the statute. Third, I'd like to deal 16 with the motion to expedite, which again, Your 17 Honor, in our view has been largely mooted by 18 the filing of -- of briefs by -- by all sides on 19 the issues that are really relevant to this 20 particular appeal. 21 We certainly have an interest, Your 22 Honor, on petitioner's side in a prompt 23 resolution for the reasons set forth both in our 24 petition and in our motion to expedite and 25 certainly feel that the Court has now before it</p>

<p style="text-align: center;">7</p> <p>1 full briefing on that issue.</p> <p>2 Lastly, should the Court wish to indulge</p> <p>3 us to any degree on the merits, we're certainly</p> <p>4 fully prepared on our side of the table to</p> <p>5 discuss what we think is the ultimate issue in</p> <p>6 this case, which is whether the deadlines within</p> <p>7 24A M.R.S.A. 6913(1)(A), are mandatory or</p> <p>8 directory. We think that's the only issue</p> <p>9 really before the Court and we're certainly</p> <p>10 prepared to discuss those.</p> <p>11 Starting first with why it is that we are</p> <p>12 before Your Honor, this case is rather straight</p> <p>13 forward. There are two statutory requirements</p> <p>14 that the DHA board has failed to comply with.</p> <p>15 In Section 6913(1)(A), they are required to hold</p> <p>16 a hearing and to determine the aggregate</p> <p>17 measurable cost savings no later than April 1st,</p> <p>18 and in this case, no later than April 1, 2006.</p> <p>19 Rather than complying with those statutory</p> <p>20 obligations that are very clear, and no one</p> <p>21 here, to my knowledge, is arguing that they</p> <p>22 aren't, but rather than comply with those clear</p> <p>23 statutory requirements, the Board refused or</p> <p>24 failed to act and instead issued a decision that</p> <p>25 essentially would cross out the April 1st</p>	<p style="text-align: center;">9</p> <p>1 go to the Court to require them to comply. We</p> <p>2 have done that.</p> <p>3 And again, the issue before the Court is,</p> <p>4 in my view, rather plain, are the deadlines</p> <p>5 mandatory or are they directory. If they're</p> <p>6 mandatory, the Board won't have the power to</p> <p>7 issue a valid determination with regard to</p> <p>8 aggregate measurable costs because they have</p> <p>9 refused to issue one by April 1st. Even if it's</p> <p>10 directory, though, this Court and others in the</p> <p>11 past have made absolutely clear that the agency</p> <p>12 is without power to ignore statutory deadlines.</p> <p>13 I think this Court most recently in McGee upheld</p> <p>14 that foundational principle. Where the deadline</p> <p>15 says shall, that means something. The agency</p> <p>16 has no power to simply ignore it.</p> <p>17 We turn next to the issue of jurisdiction</p> <p>18 and the issues that have been raised by the DHA</p> <p>19 Board. In response to --</p> <p>20 THE COURT: You wanted to refer under the</p> <p>21 statutes to two deadlines -- deadlines on two</p> <p>22 issues that the Board had.</p> <p>23 MR. ROACH: Yes, Your Honor.</p> <p>24 THE COURT: One was the aggregate</p> <p>25 measurable cost savings, the other one was what,</p>
<p style="text-align: center;">8</p> <p>1 deadline that was imposed by the legislature and</p> <p>2 impose instead an April 15, 2006 -- I apologize,</p> <p>3 an August 15, 2006, deadline to hold the hearing</p> <p>4 and no indication whatsoever on when it would be</p> <p>5 that they would actually issue a determination</p> <p>6 of aggregate measurable costs.</p> <p>7 Now below, Your Honor, all the</p> <p>8 petitioners have explained why in our view</p> <p>9 that was unlawful, why the legislature made</p> <p>10 clear what it wanted the DHA Board to do and</p> <p>11 offered up alternatives to -- to accomplish</p> <p>12 that. They -- they instead refused and issued</p> <p>13 their determination that essentially ignores</p> <p>14 those requests and those requirements under</p> <p>15 6913(1)(A).</p> <p>16 The petitioners thereafter did what this</p> <p>17 very Court and the Law Court in the past</p> <p>18 directed that it do, if you have agency</p> <p>19 inaction, you have to go to court to address</p> <p>20 that. Otherwise you can't complain later. That</p> <p>21 is what the -- the case law stands for. That's</p> <p>22 what Bradbury stands for, that's what this --</p> <p>23 this county's decision in Concannon stands for.</p> <p>24 You must go -- your redress if you are</p> <p>25 petitioners facing inaction by an agency is to</p>	<p style="text-align: center;">10</p> <p>1 the offset?</p> <p>2 MR. ROACH: No, the other is -- the other</p> <p>3 is to hold a hearing.</p> <p>4 THE COURT: The hearing.</p> <p>5 MR. ROACH: The hearing must necessarily</p> <p>6 predate in sequence the determination of</p> <p>7 aggregate measurable cost. And so they must</p> <p>8 have held the hearing and they must have</p> <p>9 determined aggregate measurable cost no later</p> <p>10 than April 1st under the statute.</p> <p>11 Now, Your Honor, turning next to the</p> <p>12 jurisdictional argument, we frankly I don't</p> <p>13 think believe we would see what we saw in</p> <p>14 response to our -- to our petition and to our</p> <p>15 briefs, both of which made clear that we were</p> <p>16 pursuing action by this Court based on the</p> <p>17 inaction of the Board under Section 5 M.R.S.A.</p> <p>18 11,001, Sub 2, which clearly applies to this</p> <p>19 type of situation. We're dealing here with</p> <p>20 inaction by the Board, a failure or a refusal to</p> <p>21 adhere to a statutory deadline, and then we go</p> <p>22 to court as directed by -- both by the plain</p> <p>23 language of the statute and the Court.</p> <p>24 In response, the DHA Board without even</p> <p>25 citing the section under which we have -- we</p>

<p style="text-align: center;">11</p> <p>1 have sought this Court's redress said instead 2 that this is not final agency action. With all 3 respect, that's right, it isn't final agency 4 action, it is not action at all. And that's 5 precisely why we are here in front of the Court 6 and precisely why the legislature set out in 5 7 M.R.S.A. 11,001 Sub 2 that that particular 8 section is applicable for redress when there's 9 agency inaction. That's what we have here, is 10 inaction.</p> <p>11 The respondents DHA Board would suggest, 12 as they apparently have in their brief, that the 13 Court ignore that provision, simply erase it 14 from -- from the books of the legislature. I 15 would submit, Your Honor, that although 16 baffling, that is consistent with their position 17 ultimately on whether or not they needed to hold 18 a hearing and issue a determination. They have, 19 as they did below, when they erased the 20 statutory requirement to hold a hearing and to 21 issue their determination by April 1st, they 22 would now have this Court erase the 23 requirement -- the -- the right that the 24 petitioners have to come in and seek redress for 25 their inaction.</p>	<p style="text-align: center;">13</p> <p>1 require that they comply with the statute. 2 The third issue that I told the Court 3 that I wanted to address was the motion to 4 expedite. Again, in our view, Your Honor, this 5 has been largely mooted by the fact that the DHA 6 Board, which is the real respondent in this 7 case, has already submitted a brief that deals 8 both with jurisdiction and with the merits of 9 the case in a way that they apparently feel was 10 satisfactory. I think they got ultimately -- 11 although part one in our view is irrelevant, 12 because it deals with final agency action, part 13 two deals with directory versus mandatory. They 14 make the argument that the statute should be 15 directory.</p> <p>16 What they leave out is the obvious 17 conclusion. We agree that this comes down to is 18 the deadline mandatory or is it directory. 19 Where we disagree is apparently they would view 20 directory as akin to discretionary. There is no 21 support in the law for that proposition. And I 22 would point the Court to its recent decision in 23 McGee, to this county's decision in the 24 Concannon case, where the Court made absolutely 25 clear what the prior precedents from the Law</p>
<p style="text-align: center;">12</p> <p>1 I would ask the Court only -- under what 2 circumstances I would ask -- I would ask 3 respondents to address, under what circumstances 4 could petitioners in our situation faced with 5 inaction by an agency attempt to get redress in 6 Court if not for 5 M.R.S.A. 11,001 Sub 2. That 7 is precisely what this particular provision is 8 for, that is what we have sought relief under. 9 Again, it's baffling to me having not only cited 10 it but quoted it in our petition and in our 11 briefs that it's not addressed at all, at all in 12 their papers. And instead, they've tried to 13 focus the Court on final agency action.</p> <p>14 Again, we did what we were supposed to do 15 under the -- the existing statutory construct 16 and under the prior precedent both from the Law 17 Court and from this Court. It -- in my view it 18 couldn't be more clear.</p> <p>19 I would suggest to the Court that if the 20 Court had any doubt but that it needed to issue 21 an order to require an agency to comply with the 22 statutory obligation, their response to our 23 petition and to our briefs reinforces that if 24 there's to be any meaningful process here, the 25 Court is going to have to step in, intercede and</p>	<p style="text-align: center;">14</p> <p>1 Court mean. They don't mean that the agency can 2 simply ignore the statutory deadlines. They 3 mean that if they are ignored and there is no 4 consequence, then perhaps the agency will not be 5 prohibited from making whatever determination it 6 was supposed to make but instead they must -- 7 they must do so immediately. It's not a free 8 pass. Directory does not mean discretionary. I 9 think that we've -- we have fully briefed those 10 issues and we are certainly prepared to argue 11 them today.</p> <p>12 Again, I -- I understand the Court's 13 admonition on the merits of the case and so 14 I won't address them further unless the Court 15 has -- has specific questions about them. But 16 certainly at bottom, Your Honor, our view is 17 that it doesn't make any difference. It doesn't 18 make any difference to this particular 19 petitioner whether these deadlines are deemed 20 mandatory or whether they're deemed directory. 21 The Board's refusal to act is unlawful.</p> <p>22 At best -- or at worst, depending on 23 which case you're in, they would be prevented 24 from making the aggregate measurable cost 25 savings determination. But at best, at best</p>

<p style="text-align: center;">15</p> <p>1 they have to comply now. They have to hold a</p> <p>2 hearing that's required by the legislature now.</p> <p>3 Your Honor, again, we don't have --</p> <p>4 THE COURT: So even -- I wasn't clear,</p> <p>5 they even continued the hearing?</p> <p>6 MR. ROACH: I'm sorry, Your Honor, what?</p> <p>7 THE COURT: In addition to the decision,</p> <p>8 they continued the hearing as well?</p> <p>9 MR. ROACH: They did continue -- they --</p> <p>10 THE COURT: Doesn't the statute say that</p> <p>11 they may hold a hearing but they're not required</p> <p>12 to.</p> <p>13 MR. ROACH: I don't believe so, Your</p> <p>14 Honor.</p> <p>15 THE COURT: Okay.</p> <p>16 MR. ROACH: I believe that the statute</p> <p>17 says that after holding a hearing or after an</p> <p>18 opportunity for a hearing --</p> <p>19 THE COURT: Opportunity for a hearing.</p> <p>20 MR. ROACH: Opportunity for a hearing.</p> <p>21 Well, we've been afforded no opportunity for a</p> <p>22 hearing.</p> <p>23 THE COURT: Okay.</p> <p>24 MR. ROACH: And certainly, Your Honor, I</p> <p>25 don't think that the DHA Board, but I will leave</p>	<p style="text-align: center;">17</p> <p>1 question, I get the impression from the filings</p> <p>2 that both parties seem to think this statute is</p> <p>3 unenforceable in terms of the deadlines.</p> <p>4 That -- that they can't get the material or the</p> <p>5 information necessary by -- to make a decision</p> <p>6 April 1st and you can't do your job, or your</p> <p>7 clients can't do their job if they don't make</p> <p>8 the April 1st. And so -- I seem to see that in</p> <p>9 the -- in the briefings. What's your</p> <p>10 understanding?</p> <p>11 MR. ROACH: I think -- I think it's a</p> <p>12 good question, Your Honor. I think that -- that</p> <p>13 the answer to it really is -- lies in if they</p> <p>14 follow the -- the procedures that are set out by</p> <p>15 the legislature -- they would have the Court I</p> <p>16 think be under the misimpression, intentional or</p> <p>17 not, that their only opportunity to -- to make</p> <p>18 this determination A, is April 1st. As a</p> <p>19 practical matter, their determination, their</p> <p>20 supporting information, go in front of the</p> <p>21 superintendent of insurance. I mean this is</p> <p>22 literally -- this determination by the Board is</p> <p>23 the tip off in the game. I mean this is --</p> <p>24 THE COURT: Right.</p> <p>25 MR. ROACH: The game starts, they make</p>
<p style="text-align: center;">16</p> <p>1 it to them to make this argument, I don't think</p> <p>2 that the DHA Board would suggest they weren't</p> <p>3 required to hold a hearing. They issued a</p> <p>4 notice of pending proceeding and hearing in this</p> <p>5 matter, they issued a procedural order. Both of</p> <p>6 those documents were for the purpose of holding</p> <p>7 the hearing that they understood were required</p> <p>8 under the statute.</p> <p>9 I would also note that in both of those</p> <p>10 documents, as well as in their response to our</p> <p>11 request to have a brief period of discovery, we</p> <p>12 were admonished, the petitioners were admonished</p> <p>13 by the DHA Board when it said that it had to</p> <p>14 hold the hearing and issue its determination not</p> <p>15 later than April 1st. They now have -- have not</p> <p>16 only ignored that statutory requirement but</p> <p>17 ignored their own prior writings, which were</p> <p>18 literally, you know, six to eight weeks ago.</p> <p>19 They have taken the position that they</p> <p>20 understood that they were required to make the</p> <p>21 determination, they failed to make the</p> <p>22 determination, and we're just simply asking the</p> <p>23 Court to require them to do so.</p> <p>24 THE COURT: Okay. Without -- without</p> <p>25 getting into the merits but just as a threshold</p>	<p style="text-align: center;">18</p> <p>1 the aggregate measurable cost determination,</p> <p>2 within a month they have to supply that</p> <p>3 information and determination to the</p> <p>4 superintendent. We then have an adjudicatory</p> <p>5 process. If they think that there's information</p> <p>6 that they don't have, that they don't have today</p> <p>7 that is actually relevant and could -- and could</p> <p>8 be relevant to one of the cost saving measures,</p> <p>9 they can certainly attempt to put it in in front</p> <p>10 of the superintendent. This is not a -- this is</p> <p>11 not a situation in which they would be forever</p> <p>12 closed or prevented under the statute from doing</p> <p>13 so.</p> <p>14 The other piece that I will say is that</p> <p>15 the legislature -- I think, the legislative</p> <p>16 framework fits nicely and I think recognizes</p> <p>17 that this is a lengthy process. There are</p> <p>18 multiple steps here that have to be undertaken</p> <p>19 before you actually get to a savings offset</p> <p>20 payment. It made perfect sense to start in</p> <p>21 April, that leads to a decision by the</p> <p>22 superintendent by mid June, which then leads to</p> <p>23 a determination by the DHA Board of the savings</p> <p>24 offset payment, which then can be used in rate</p> <p>25 making. I mean it is very -- it is very</p>

<p style="text-align: center;">19</p> <p>1 logical. And in fact, Your Honor, even if they 2 were foreclosed from putting any information 3 into the record, into the determination of 4 aggregate measurable cost after April 1, that's 5 what the legislature said. The DHA Board has 6 decided that it needs this information in order 7 to include it in and among certain cost saving 8 measures. They have most of the information. 9 They already have most of the information to do 10 this.</p> <p>11 Not only have they not made any 12 determination, they haven't supplied any of the 13 information. I mean they have not -- In McGee 14 the issue was substantial compliance. And even 15 there the Court said, would the -- would the 16 agency simply hold that none of these deadlines 17 mean anything, that it has the discretion to 18 simply ignore the statutory deadlines. Even 19 under those circumstances the Court raised those 20 questions.</p> <p>21 In this case you can't even call this an 22 attempt at compliance, never mind substantial 23 compliance. We have the ability to do the 24 methodologies for the aggregate measurable 25 costs, that's been made clear by their own</p>	<p style="text-align: center;">21</p> <p>1 THE COURT: Under the statutory scheme, 2 are the insurers required to get their data to 3 the Board -- their year end data to the Board by 4 March 1st? Is that your understanding?</p> <p>5 MR. ROACH: Which year end data are you 6 referring to, Your Honor?</p> <p>7 THE COURT: Whatever it is the Board uses 8 to determine the aggregate measurable cost 9 savings.</p> <p>10 MR. ROACH: It's a good question. They 11 use -- they use different pieces of data. In 12 the first instance they use a --</p> <p>13 THE COURT: But my question is, do the 14 insurers have a deadline of March 1st to provide 15 certain information to the Board under this 16 statute.</p> <p>17 MR. ROACH: I'm not aware, Your Honor -- 18 I -- or at least I didn't focus on it for this 19 hearing, of a provision that requires the 20 insurance companies to get to -- to provide 21 information to the Board that we've not 22 provided.</p> <p>23 THE COURT: No, I'm not -- I'm trying to 24 determine whether or not this Board has a -- has 25 a window of 30 days to hold a hearing and make</p>
<p style="text-align: center;">20</p> <p>1 experts. We have -- the vast majority of the 2 data is available. I -- I don't know that 3 anyone can dispute that. They may dispute 4 whether or not they want to populate the spread 5 sheets that are necessary to do these 6 calculations, I'm not sure what their -- what 7 their argument would be on why they can't 8 provide information today and go forward today. 9 But certainly it is -- it is in no way 10 sufficient to override the legislative mandate 11 here.</p> <p>12 Even if that were relevant, which in our 13 view it isn't relevant to making the discreet 14 determination that we're asking you to make, 15 which is it the deadline mandatory or is it 16 directory. There is no balancing of harms 17 analysis that's done here. With all due 18 respect, there is no irreparable harm standard. 19 There is no ripeness standard. There is -- 20 there is the statute which says for inaction 21 petitioners may seek redress. And then there 22 are the -- the decisions which say the same 23 thing. For inaction, petitioners may seek 24 redress and request that the Court order them to 25 comply.</p>	<p style="text-align: center;">22</p> <p>1 this decision. Is that -- is that not the case?</p> <p>2 MR. ROACH: That is not the case.</p> <p>3 THE COURT: Okay. That answers my 4 question.</p> <p>5 MR. ROACH: I apologize, I wasn't --</p> <p>6 THE COURT: I'll let the Board explain.</p> <p>7 MR. ROACH: Let them explain that, but I 8 apologize, I wasn't understanding that. This 9 proceeding was started up, the DHA Board's 10 consultant in the first instance determined what 11 it felt to be the appropriate methodology, they 12 shared those with us, albeit -- albeit very late 13 and not in accordance with the procedural order 14 by the Board, and then this proceeding was 15 called to a halt by virtue of the continuance.</p> <p>16 THE COURT: Okay.</p> <p>17 MR. ROACH: It's an unlawful continuance. 18 We would ask that the Court make the 19 determination about whether or not this is 20 mandatory or directory, and at the very least 21 order that they comply with the statute and hold 22 the hearing immediately.</p> <p>23 THE COURT: All right. Thank you.</p> <p>24 MR. ROACH: Thank you, Your Honor.</p> <p>25 THE COURT: Ms. Wyman.</p>

<p style="text-align: center;">23</p> <p>1 MS. WYMAN: Good morning, Your Honor. 2 I'm here on behalf of the Dirigo Health Board. 3 Mr. Laubenstein, who submitted the brief, was 4 unable to be here. 5 I just want to pick up on that last 6 point, that this was a quote, unlawful 7 continuance, unquote. The reason why we take 8 the position that Section 11,001 Subsection 2 9 doesn't apply is because we are in the middle of 10 an administrative process. 11 Section 11,001(1), Subsection 1, is the 12 section of the APA that applies here, Your 13 Honor. And specifically the language in that 14 section which reads, preliminary, procedural 15 intermediate or other nonfinal agency action 16 shall be independently reviewable only if review 17 of the final agency action would not provide an 18 adequate remedy. That's what's before the Court 19 today. It's not failure of Dirigo Health Board 20 to act. In fact it was the Dirigo Health 21 Board's continuance, order of continuance, which 22 triggered this -- this 80-C appeal. They don't 23 like the fact that the Board has already looked 24 at the issue of whether it can issue a 25 continuance and interpreting its own statute,</p>	<p style="text-align: center;">25</p> <p>1 become inaction? 2 MS. WYMAN: It becomes -- we have an 3 action here that they have appealed. It's a 4 procedural nonfinal agency action. They do 5 have the right to come to this Court under 6 Subsection 1 and ask this Court to look at that 7 determination and make a decision as to whether 8 it meets the standard, and that is whether it 9 shall be independently reviewable, only if 10 review of the final agency action would not 11 provide an adequate remedy. 12 THE COURT: But -- 13 MS. WYMAN: And here we say it does, 14 because the issue is not ripe. This mandatory 15 directory issue, they have fully preserved that 16 issue for appeal. And when the Board has made 17 its final determination on final agency action, 18 we assume they will appeal on that basis. 19 THE COURT: But for purposes of the 20 argument -- 21 MS. WYMAN: Yes. 22 THE COURT: -- at what point in 23 continuances by the Board does it become failure 24 to act? 25 MS. WYMAN: Then it would be if they --</p>
<p style="text-align: center;">24</p> <p>1 has determined that it can. 2 It has not ignored the April 1st 3 deadline. The April 1st deadline has been 4 uppermost in the mind of the agency and the 5 Board. What they did is made a determination 6 that they could not do the work that they needed 7 to do under the statute, and that's to determine 8 measurable cost savings by the April 1st 9 deadline. And they have a presiding officer who 10 issued a recommended decision, after the issue 11 was fully briefed, and that recommended 12 decision, which was submitted to this Court as 13 part of this record, was adopted by the Board. 14 That is agency action. It's not final agency 15 action, but it's agency action. It's not 16 inaction. 17 The case they cite -- or cases that they 18 cite under Subsection 2 involve an agency simply 19 doing nothing, not acting on an application, not 20 taking any action whatsoever. Here you're in 21 the middle of -- of an administrative process. 22 You've got a presiding officer, you've got a 23 Board who has issued a continuance to hold the 24 hearing. 25 THE COURT: At what point in time does it</p>	<p style="text-align: center;">26</p> <p>1 for example, after -- they -- in the decision 2 that was adopted by the Board, they said that 3 they would have a hearing no later than August 4 15th. 5 THE COURT: What if they continue that 6 hearing? 7 MS. WYMAN: Then I think that you might 8 be getting into a situation where you truly had 9 agency inaction. 10 THE COURT: How do I determine that? 11 MS. WYMAN: Well, you have to look at 12 whether the Board is acting in a way that meets 13 the standard under Subsection 2, which would be 14 whether there has been complete inaction on the 15 part of the agency which then prejudices the 16 rights of the parties. That hasn't happened 17 here. What you have is a procedural order. And 18 they have the right -- they want very much for 19 this Court -- 20 THE COURT: But an August continuance 21 would be a procedural order, too, as would a 22 November, as would a December. I'm trying to 23 find out if these are simply procedural -- 24 MS. WYMAN: Right. 25 THE COURT: -- and not subject to Sub 2.</p>

<p style="text-align: center;">27</p> <p>1 MS. WYMAN: We're not there yet, we're 2 not even close to being there. 3 THE COURT: When do we get there? 4 MS. WYMAN: If they -- and you have to 5 understand, I'm not as intimately familiar with 6 the statute as others in this room. 7 THE COURT: I certainly am but you know 8 more about it than I do. 9 MS. WYMAN: We can have a good 10 conversation about this. I know nothing about 11 this. 12 But my understanding is if they were 13 unable to perhaps in the fall, which is the 14 period of time -- last year, for example, they 15 did all of this, the superintendent of insurance 16 issued its decision on October 29th, and that 17 gave the parties sufficient time to do what they 18 needed to do to get the rates in place. If it 19 went beyond that point, I would say it was 20 agency inaction, potentially. 21 But at this point what you have is the 22 Board is trying to do what it needs to do in 23 recognition that there's an issue out there as 24 to whether the April 1st deadline is directory 25 or mandatory. We take the position that it's</p>	<p style="text-align: center;">29</p> <p>1 what the petitioners wanted, but in granting the 2 continuance of the proceeding, they in fact did 3 act. 4 A refusal to act, on the other hand, and 5 I would distinguish this from what the 6 petitioners just argued, that they said it's 7 either a refusal or a failure, a refusal is when 8 they deny, for example, an approval of an 9 application or a permit or at some -- something 10 like that. And that didn't happen here. 11 THE COURT: No, because a denial would be 12 an act. 13 MS. WYMAN: And a denial is an act. 14 THE COURT: So that wouldn't be a refusal 15 to act? 16 MS. WYMAN: If they refuse what the -- 17 what the -- if they refused what the applicant 18 was asking for -- for example, in the EMMC case 19 and in various cases cited by the applicants, 20 these are requests for approval and the -- and 21 the request for approval was denied, it was 22 refused, in essence. So we don't have either of 23 those things here, what we have -- and we don't 24 have inaction, this is not inaction. There was 25 a recommended hearing here, a decision which was</p>
<p style="text-align: center;">28</p> <p>1 directory. But we understand that that's an 2 issue that will be on appeal when it's ripe. 3 It's not ripe at this moment. And that's why we 4 briefed it under 11,001 Subsection 1 and not 2. 5 Subsection 2 doesn't apply here. 6 THE COURT: Okay. 7 MS. WYMAN: Thank you. 8 THE COURT: Thank you. 9 MR. ROACH: Mr. Ditre, do you wish to be 10 heard? 11 MR. DITRE: Yes, sir. Your Honor, I'm 12 not going to repeat what you've already heard, 13 but one thing, I wanted to answer a couple of 14 the questions you just brought up. 15 But before doing so, I'd just like to say 16 that this morning when I gave my daughter 17 breakfast, it was a pear, and she bit into it 18 and she said this is so not ripe. And I said 19 exactly. And she looked back, and she was like, 20 what is he talking about. I was thinking about 21 this case of course. 22 Just as Ms. Wyman just said, this is not 23 a refusal to act, this is not a failure to act. 24 A failure to act is no action. Here the Board 25 did take action. The action might not have been</p>	<p style="text-align: center;">30</p> <p>1 adopted by the Board that continued the hearing 2 because the Board determined that they did not 3 have sufficient information which will only be 4 available, most of which was -- or some of which 5 will only be available in June, that they didn't 6 have enough information -- 7 THE COURT: And tell me about that 8 information. I know that's been discussed, but 9 I don't understand it. What kind of information 10 are we talking about? 11 MR. DITRE: There's multiple -- and this 12 really gets into some of the merits, but 13 basically the Board needs to determine aggregate 14 measurable cost savings. These are complex 15 calculations that involve the capital investment 16 fund, operating margins by hospitals, bad debt 17 and charity care, I mean there are multiple 18 calculations using different pieces of 19 information, some of which are in the medicare 20 cost reports, some of which are in medicaid 21 reports, some of which are the Maine Health Data 22 Organization, I mean these are complex 23 calculations that the Board must make. 24 In their own determination they decided 25 that they didn't have data that would provide --</p>

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1 enable them to make an accurate and -- decision,
 2 and therefore it would not be fair and equitable
 3 to the people if they came up with a decision
 4 that underestimated in essence the savings
 5 offset payment. Then in essence people who need
 6 health insurance that are funded by, once an
 7 assessment is placed -- after this calculation
 8 is done, there is another two steps that happen.
 9 THE COURT: Right.
 10 MR. DITRE: The superintendent basically
 11 has to determine that there is reasonable
 12 evidence and support in the record for what the
 13 Board determined to be the savings. So that's
 14 another proceeding. And then after that, the
 15 Board then determines what is the level of
 16 assessment.
 17 THE COURT: Okay.
 18 MR. DITRE: And basically -- so we're so
 19 far removed from where they -- where any
 20 prejudice or harm may come, because all they're
 21 doing now is saying that we don't have the data
 22 that we need in order to make a determination.
 23 And that's basically a -- that's within -- to be
 24 provided --
 25 THE COURT: Well, what happened to that

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1 concept when the legislature created April 1st?
 2 MR. DITRE: What happened to --
 3 THE COURT: I mean were they aware that
 4 all of this information was not going to be
 5 available until after April 1st.
 6 MR. DITRE: You know, I don't know what
 7 they were aware of, Your Honor. It's hard to
 8 say. The legislative process -- as you can see,
 9 this is where I'm going back to -- is
 10 unpredictable.
 11 But I guess the other thing that I -- I
 12 just wanted to point out is -- is this. I mean
 13 the agency has basically made a factual
 14 determination which we believe should be
 15 accorded deference, that they didn't have the
 16 information that they needed.
 17 They also have -- there are numerous
 18 steps that will occur later that -- that give
 19 the opportunity to the petitioners to basically
 20 get what they need. In other words, by this
 21 decision of the savings offset payment, all it
 22 is is a calculation of how much has been saved.
 23 Later the superintendent has to make a
 24 determination of whether there's reasonable
 25 evidence to support that.

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1 So, for example, the superintendent could
 2 say, I don't find evidence to support this and
 3 there are no savings here. There's no harm.
 4 Later the Board can say -- even if there were
 5 savings found, they could reduce that amount,
 6 because it's capped by three different
 7 provisions within the -- within the actual
 8 statute. It says the savings can't be greater
 9 than the actual savings, that's the first cap.
 10 The savings cannot exceed -- the assessment on
 11 the petitioner's cannot exceed 4 percent of paid
 12 claims or the budget of the agency, the
 13 budgetary needs of the agency. So we are very
 14 far away from where an actual determination
 15 would be to basically prejudice the petitioners
 16 in any way.
 17 So it's our position that in essence this
 18 is not a refusal to act, this is not a -- a
 19 failure to act, this is not inaction. They
 20 acted. It was the granting of a continuance.
 21 And no matter how the petitioners try to
 22 characterize this as an action, it's -- it's
 23 simply a procedural decision. And then like all
 24 procedural decisions, then basically -- they --
 25 they -- it's not final agency action and they

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1 have the ability at the end of the hearing
 2 process basically to appeal that decision.
 3 THE COURT: Well, there are a number of
 4 steps in this process.
 5 MR. DITRE: Yes, there are, sir.
 6 THE COURT: And obviously one is
 7 dependent upon the other. I'll ask you the same
 8 question I asked Ms. Wyman. At what point does
 9 the procedure become substantive, which we know
 10 can happen?
 11 MR. DITRE: Sure. And in the cases that
 12 they cited, again there was inaction, there was
 13 no action taken. And those cases had gone on
 14 for literally years. There was -- I think there
 15 was one in which there was 128 days after the
 16 statutory deadline, 128 days later they still
 17 had not acted. In other cases there are years,
 18 literally, where the agency does not take
 19 action. And I would say at that point you're --
 20 but I would ask this question, Your Honor, what
 21 would be the interest of the agency which
 22 basically survives on the subsidies that come
 23 from the assessment to not act here? In essence
 24 no one would get coverage under the Dirigo
 25 Health program, none of the people who are

1 uninsured or underinsured would get coverage
2 under Dirigo if the agency failed to act and
3 kept on extending the deadlines, because it's
4 not in their interest to do so, because they
5 want -- their purpose is to provide people who
6 are uninsured and underinsured with affordable
7 quality health coverage that is subsidized, and
8 the subsidies come from the assessment that
9 comes two steps after where we're at now.

10 THE COURT: But -- and I'm being the
11 devil's advocate here just to try to understand
12 this, as I understand the process, it is the
13 responsibility of the -- the petitioners, the
14 insurers, to negotiate with the health providers
15 a -- a cost savings -- the whole business of
16 cost shifting and everything else, that is, the
17 savings that can be realized in order to pay for
18 this extended coverage. Obviously there's a
19 process that they have to go through which has a
20 time element to it. I don't know whether
21 there's agreement -- I -- all I know is what I
22 read in the paper, as to whether or not there is
23 agreement that the companies have the right
24 after the analysis of cost savings to then ask
25 for rate relief. But assuming that they do,

1 then that has a process.

2 At some point isn't it clear that you're
3 backing up the people who are supposed to be
4 implementing these savings to a point where they
5 can't get relief and now you've got -- you're in
6 a confiscatory type of situation?

7 MR. DITRE: No, Your Honor, actually.
8 With regards to the -- that's -- that's --
9 that's actually an issue that is now over in the
10 state legislature, which is a completely
11 separate from this.

12 THE COURT: Okay.

13 MR. DITRE: In essence in the statute,
14 the -- the insurers, who are assessed, if
15 they -- under the statute. What they have to do
16 in the small group statute and the nongroup
17 statute, it requires that an applicant that
18 adjust its rates shall account for, these are
19 the actual words, account for the savings offset
20 payment or the recovery of a savings offset
21 payment, and that's in Section 2736 of the
22 nongroup statute and 2808-B of the small group
23 statute, that they shall account for the savings
24 offset payment or the recovery of that.

25 They -- what you're pointing out is

1 actually how they can get relief even if they
2 were assessed as a result of three steps, four
3 steps, five steps down the line. In fact the
4 Dirigo statute says that they don't have to pay
5 the assessment until the close of -- 60 days
6 after the close of the quarter in which they're
7 required to pay the assessment. So they have --
8 so, for example, if the first quarter of the
9 assessment for this proceeding that we're now in
10 is January through March of '07, they have to
11 make the payment in -- within the close of 60
12 days of that, which would be somewhere in May.

13 And so again, we're so far away from a
14 ripeness of this issue, because all we're at is
15 the point where we're determining what are the
16 savings. And the agency is simply saying in its
17 decision, determination, they don't have the
18 information that they need to make that. In
19 fact I would -- I would argue that the most
20 relevant piece of -- of -- for -- to answer all
21 the questions here is really in the Board's
22 decision, in Section 3 of it, in which they
23 basically say they can't make an accurate
24 decision of that aggregate measurable cost
25 saving because they don't have the information

1 that they need. They believe that the April 1st
2 deadline, that the legislature didn't intend the
3 April 1st deadline to result in a decision that
4 would be incomplete or outdated.

5 And so, you know -- and the other thing
6 that I think is very important to understand in
7 terms of this, because I heard Mr. Roach talking
8 about a time frame which basically is his
9 construct, but this -- this decision says that
10 they have -- they shall hear this -- continue
11 the adjudicatory proceeding not later than
12 August the 15th. So they can -- once they get
13 those medicare cost reports, for example, in
14 June, that's the earliest that they may be
15 available, that they need, then they can proceed
16 with a hearing sometime in June or July. So
17 it's not -- they're building sort of a --
18 they're constructing the worst case scenario at
19 the outset of everything, when in fact it might
20 proceed much more quickly, that's why we really
21 believe that this is not ripe for action here.

22 THE COURT: When did they anticipate that
23 they were going to get the information
24 necessary? I mean how realistic is a possible
25 June hearing?

1 MR. DITRE: I believe that the decision
2 says that at earliest that the information that
3 they believe would be needed would be June. So
4 I don't know the answer to your question --

5 THE COURT: Okay.

6 MR. DITRE: -- in terms of -- again,
7 there are multiple -- I mean the petitioners
8 would argue that -- that the only savings under
9 the Dirigo program that can be calculated are
10 reduction in bad debt or charity care as a
11 result of the operation of the program or
12 expansions of medicaid, that's been their point
13 of view. They have I think three or four cases
14 filed in the Cumberland County Court, I think
15 they've got another four filed here, and that
16 will be decided. But the Dirigo Health Agency
17 argues that aggregate measurable cost savings
18 are not just those of the reduction of bad debt
19 and charity care, it includes the operation --
20 the reduction in operating margins at the
21 hospitals, the price reductions, the charge
22 reductions by the hospitals, any savings as a
23 result of the certificate of need provisions
24 that basically constrain spending on new
25 buildings and new equipment and new

1 technologies, et cetera, those are all things
2 that need to be considered. And that
3 information is also part of the information that
4 they need.

5 THE COURT: Another question which isn't
6 jurisdictional and I probably shouldn't be
7 asking it, but what is the motivation for the
8 hospitals? Is this a third-party-payer
9 situation? What is their motivation to pass on
10 those savings?

11 MR. DITRE: I think that because -- when
12 you reduce prices, I believe this is -- if
13 prices were reduced, then those savings would
14 result in lower premiums as well as more --
15 which would then result in more people having
16 access to affordable coverage. As costs go
17 down -- if those costs, and this is important,
18 if those costs are actually recovered, those
19 savings are actually recovered, then they can be
20 put into more people getting coverage --

21 THE COURT: No, no, I understand that,
22 and it makes -- I understand the economics and
23 that makes sense. But I'm -- as I understand
24 it, the burden is on the carriers to negotiate
25 these savings -- negotiate with the hospitals,

1 that the lower cost shifting -- rate of cost
2 shifting and bad debt and so forth is going to
3 result in savings. What I don't -- what I'm
4 unclear on is what if the hospitals say hey,
5 great, we're going to increase our profit
6 margin?

7 MR. DITRE: I mean --

8 THE COURT: Is that the marketplace
9 that -- that -- the bill anticipates -- the law
10 anticipates would take place?

11 MR. DITRE: Yes, it does. It anticipates
12 that there will be a negotiation between the
13 providers and the payers. And the payers
14 include more than just the insurers. For
15 example, third-party administrators are also
16 included in that. But it does anticipate that
17 marketplace dynamic of recovering the savings in
18 order to bring down costs.

19 THE COURT: Thank you.

20 MR. DITRE: Thank you.

21 THE COURT: Mr. Roach.

22 MR. ROACH: Yes, thank you, Your Honor.

23 THE COURT: When does a motion for
24 continuance -- when is it a procedural order and
25 when is it a failure to act?

1 MR. ROACH: Well, I think there -- they
2 are somewhat distinct, depending on the process,
3 Your Honor. I think a motion to continue, if
4 it's in the context of a statutorily permitted
5 period of time, but a party could say I've been
6 prejudiced by that continuance, again that would
7 be a -- an action that would be -- that would
8 need to be final agency action under 11,001 Sub
9 1.

10 Here, however, we have -- in addition to
11 the -- what they've deemed to be the action of
12 granting the motion to continue, we have the
13 inaction of complying with statutory deadline
14 and holding the hearing and issuing the
15 determination of aggregate measurable costs.
16 Those are distinct.

17 The argument posited by the respondents
18 in this case is circular. It would -- there
19 would be no situation in which an agency would
20 be subject to any type of review. It would
21 simply need to issue some kind of decision, some
22 kind of decision saying, I've decided in my
23 judgment not to comply with the statutory
24 deadline. It could be as simple as that. And
25 that would be unreviewable by this Court?

1 Absolutely not.

2 And in fact when they say we haven't
3 cited to cases that are -- that are similar to
4 this, I would point the Court to Concannon.
5 Concannon, in which they were in the middle of a
6 process for determining a certificate of need,
7 it was in the middle of that process.

8 And I would -- and I would also point out
9 to the Court that in that particular case, the
10 statute itself allowed for an extension of the
11 statutory deadline. Notwithstanding that, the
12 courts -- and I'll just quote Justice Studstrup,
13 the Superior Court has clear statutory
14 jurisdiction to consider the petition and
15 intervening events have not yet rendered the
16 petition moot.

17 That's precisely on point with our
18 current situation, Your Honor. And I would
19 submit that if -- that if the Court were to
20 accept the methodology or the interpretation
21 posited by the respondents, they would be able
22 to escape any type of review of inaction from
23 this point forward.

24 The Court then has asked the question of
25 well, when does it become -- I guess to put it

1 differently, when would we be prejudiced by
2 this, when would we --

3 THE COURT: Well, if April 1 is no harm,
4 no foul, then when does the harm take place?

5 MR. ROACH: And, Your Honor, I think --
6 although our view is that that's not the
7 right -- necessarily the right inquiry,
8 certainly we're prejudiced now. That's why we
9 filed this lawsuit now. They would have you
10 take a rather simplistic view of this, which is
11 to say, well, they're not going to impose the
12 savings offset payment, you know, potentially
13 until next year. Don't worry, this is a long
14 process, multiple. Steps, this is going to take
15 awhile, you don't need to get entangled in this.
16 Your Honor, it's a long process for a reason.
17 And their argument actually is -- is --
18 remarkably misapprehends what happens in a rate
19 making process.

20 You cannot impose a savings offset
21 payment in March or April of year one and have
22 already collected that savings offset payment
23 from rate payers. There is supposed to be a
24 match. The savings offset payment may be
25 collected in the appropriate year rates. By way

1 of example, the savings offset payment for 2006
2 has been imbedded in premium rates for 2006. So
3 there is a match with the dollars that you are
4 collecting from members in the form of premiums
5 and in the dollars that are being paid to the
6 Dirigo Health Agency in the form of savings
7 offset payments. The suggestion that there
8 doesn't need to be a match between those two
9 is -- completely misses the point, not only of
10 practicality and of what the statutes require,
11 but also have what their own act requires.

12 Their own act requires them to -- to meet
13 certain deadlines I would submit for a reason.
14 And in fact that reason is highlighted by the
15 fact that when the legislature amended this
16 particular statute, it used to just say, by
17 April they have to hold a hearing and issue the
18 aggregate measurable savings determination. Now
19 it says April 1st. The suggestion that the
20 legislature didn't know what it was doing,
21 that's not a suggestion that the Court is
22 allowed to accept, frankly.

23 There are -- there is an adjudicatory
24 process here in front of the Dirigo Health
25 Agency Board that requires an end on April 1st.

1 It then allows them 30 days to get the
2 information supporting their decision and the
3 decision itself to the superintendent so that he
4 can hold his adjudicatory process. All of this
5 is again toward reaching a final determination
6 of aggregate measurable cost savings that only
7 then can lead to the savings offset payment.
8 None of this work can happen until they issue
9 their determination of aggregate measurable cost
10 savings. And the suggestion that we can just
11 wait --

12 THE COURT: When do you need to know the
13 savings offset?

14 MR. ROACH: We need to know the savings
15 offset essentially by around August 1, because
16 that's when we include the savings offset in
17 our -- in our rates in filings before the Bureau
18 of Insurance. Those -- those rates -- and we've
19 set all this, if I could direct the Court, we've
20 set all this out in a time line that's contained
21 within our -- our petitioner's brief. We've
22 explained what it is that we need and when.

23 When you back up, Your Honor, from those
24 dates by which we need the information, it's
25 remarkable how -- how consistent that is with

1 requirement to make its determination by April
2 1st.

3 And again, we are not suggesting that
4 they are -- we, petitioner Anthem, are not
5 suggesting that they are forever limited by the
6 information that they present by April 1st.
7 There is an adjudicatory process in front of the
8 superintendent that lasts six weeks. There will
9 be prefiled testimony, there will be evidence,
10 there will in all likelihood be some form of
11 discovery. There will then be an adjudicatory
12 process in front of the superintendent, all of
13 that culminating in the superintendent issuing a
14 determination of aggregate measurable cost
15 savings.

16 Now they point to last year. Last year,
17 Your Honor, the process was different under the
18 statute and chaotic. For anyone who was
19 involved in that proceeding to suggest that no
20 harm, no foul is -- is -- one can understand the
21 ends that they're trying to meet here. But
22 that's -- it's ridiculous to suggest that last
23 year was an appropriate period of time. The
24 statute sets out the appropriate period of time.

25 THE COURT: What about Mr. Ditre's

1 comment of there being no motivation for this
2 Board to delay? I mean it doesn't serve -- that
3 it doesn't serve the purpose of the Dirigo Act
4 to delay these decisions? I guess by the same
5 token, what is the sanction? What is the
6 penalty that Dirigo Agency must suffer if they
7 do not meet the deadline?

8 MR. ROACH: Okay. I'll answer them --
9 I'll answer them in the order that you've asked
10 them.

11 What is their motivation? It's difficult
12 obviously to speculate about another party's
13 motivation in doing -- in taking any action.
14 But I would submit, Your Honor, that it is
15 revealed in their response to our motion. Their
16 response to our motion, for reasons unknown to
17 me, focuses on whether or not insurance carriers
18 can include the insurance offset payment in
19 rates. The later they make the aggregate
20 measurable cost savings determination, the more
21 it prejudices our ability to include it without
22 creating significant customer confusion, without
23 infringing on our ability to go and have the
24 appropriate rate proceedings and without having
25 it, for example, be necessary to go to the

1 legislature to allow an emergency amendment that
2 is going to allow us to truncate the notice
3 provisions to policyholders.

4 Make no mistake about it, Your Honor, the
5 goal here is to get as high an aggregate
6 measurable cost saving as possible and have as
7 little of that passed through into rates as
8 possible, notwithstanding the statutory
9 construct. Mr. Ditre said, that's not true,
10 we're not talking about that here, they're
11 talking about that over at the legislature. I
12 would suggest, Your Honor, that there is --
13 there would be no reason for LD-16 -- 1635,
14 which is the provision that would prevent pass
15 through of the savings offset payment if what
16 they said was accurate. Statute allows a pass
17 through. I understand the rate changing
18 methodologies and would be happy to explain it
19 to the Court, about why it is that that
20 necessarily has to follow, if you're interested,
21 but the suggestion that -- that somehow there is
22 no harm here as long as they tell us, you know,
23 sometime in March what we've got to pay for the
24 savings offset payment in April is fundamentally
25 wrong. There is a match between premium rates

1 and the savings offset payment necessarily.
2 We collect it in rates. In fact I -- it's
3 imbedded -- it's imbedded in the very rates.

4 I would -- and, Your Honor, this isn't a
5 my position versus Mr. Ditre or my position
6 versus Ms. Wyman. I've enclosed for the Court's
7 review, to the extent you'd like, a copy of the
8 superintendent's decision from last year, in
9 which he makes absolutely clear that that's
10 absolutely how the statute works. He went
11 through the analysis, he found that Anthem had
12 used its best efforts to recover the savings
13 offset payment in negotiated premiums, in
14 negotiated rates with the providers, therefore
15 they were able to include that in rates. The
16 statute has a construct that allows that to
17 occur.

18 And I would submit any real delay here --
19 we've suggested a -- a schedule that will allow
20 the DHA Board to go forward now, will allow them
21 to provide the information that they can now and
22 to talk through their methodologies, and then
23 move along to the superintendent, at which time
24 they can put in or attempt to put in whatever
25 information they deem to be relevant.

<p style="text-align: center;">51</p> <p>1 That process, to the extent -- to the 2 extent there's any dilemma at all, that process 3 is the answer. The answer is not to wait -- to 4 have the tip off here while the DHA Board holds 5 the ball in the locker room. You have to start 6 the process. It has to start, because it can't 7 continue, it can't go forward without that. 8 I do know that the Court asked some 9 questions -- 10 THE COURT: The second part was what's 11 the penalty. 12 MR. ROACH: What is the penalty? Your 13 Honor, I don't know that there is a penalty in 14 the statute. My view is that -- that it's 15 within -- it's within the context of the statute 16 that there is a requirement that they hold the 17 April -- that they hold to April 1st. Read in 18 light of the -- of this particular Court's 19 determination in McGee, it's hard to find that 20 shall determine aggregate measurable cost 21 savings not later than April 1st isn't mandatory 22 under 1 M.R.S.A. Section 71. 23 I'll put that to the side, though, 24 because I think that's certainly a strong 25 indicia that it's mandatory. But putting that</p>	<p style="text-align: center;">53</p> <p>1 procedural issue of determining whether there 2 was jurisdiction. What did you get, four days 3 notice? At the most five days? What is your 4 position with respect to a hearing on the 5 merits -- once I determine the jurisdictional 6 question, what is your position on a hearing on 7 the merits? Is this -- have you had a 8 sufficient opportunity to brief and argue the 9 merits of your position at this proceeding? 10 MR. ROACH: In our view, Your Honor, and 11 I am speaking only for Anthem -- 12 THE COURT: I understand. 13 MR. ROACH: -- we feel like we have 14 briefed the issue and have argued it with the 15 Court's indulgence today. 16 THE COURT: Okay. I need to ask all 17 parties, because I'm not going to close this 18 record until everybody has had a chance to fully 19 brief the issue. And if you want to write -- 20 provide further briefs after this proceeding, I 21 want to give everybody an opportunity to do it. 22 Any of the petitioners, Mr. Frink? 23 MR. FRINK: Thank you, Your Honor. I 24 agree with Mr. Roach. On behalf of the Maine 25 Association of Health Plans, we requested</p>
<p style="text-align: center;">52</p> <p>1 to the side, if it's directory, they don't get 2 to ignore it. Again, under Concannon, they 3 don't get to ignore it. It's not a 4 discretionary call, it is you must go forward 5 now. We have suggested in our petition, in our 6 briefs, in our briefs below, what the process 7 ought to be in an orderly way that doesn't 8 prejudice us substantially, is in compliance 9 with the statute and allows them to present the 10 information that they feel that they need to 11 present. That is the appropriate work around 12 here. 13 The Court asked questions earlier of 14 Mr. Ditte and there were some answers given 15 regarding the particulars of the data. What 16 data are we looking at here. If I could beg the 17 Court's indulgence, Mr. Stiles is more familiar 18 with the actual data, so if wants to address 19 that -- 20 THE COURT: Well, let me -- I was 21 contradicting my own instructions in getting 22 some of those questions, and let me ask at this 23 point, because I think it's really important in 24 a matter of this magnitude. 25 This hearing was set as I say for the</p>	<p style="text-align: center;">54</p> <p>1 expedited treatment, we've briefed what we 2 consider to be the issues in this case 3 collectively, individually, the other side has 4 had a chance to file briefs. 5 Frankly I view this as a -- I'm a little 6 confused in my own mind about the concepts of 7 the merits in this case, this is a procedural 8 appeal on a procedural question, we're not 9 dealing at all with the underlying substance of 10 the determination of the aggregate measurable 11 cost savings or anything to do with the details 12 of how that should be calculated, we're only 13 dealing with whether there should be a hearing 14 under a statutory deadline that ended six days 15 ago on April 1st. That's the issue. It's a 16 procedural problem. 17 It's frankly, with all due respect, a 18 gross mischaracterization of -- by the agency, 19 by the Board of what it's done here. They have 20 flaunted the deadline. There are things going 21 on in the legislature that certainly have a 22 bearing on -- on this whole program. There is 23 clearly a situation where our clients, both 24 Anthem and the other health plans, will be 25 aggrieved if this is delayed. It was a very</p>

1 difficult damaging process last year, in terms
2 of relationships between carriers and their
3 customers to have to develop rates, under a
4 statutory deadline that was different last year,
5 we had to live with that, and we did, but it was
6 difficult. And it was very -- it was damaging.
7 And I believe that to some extent there may be
8 some intent here that that should continue again
9 this year and create hardship and disruption in
10 the insurance market while the legislature
11 continues to debate these issues. And I think
12 that for the -- for a Board not to step forward
13 and acknowledge that is troubling. I think that
14 the -- the fact that this agency ignores the
15 statute that it is responsible for administering
16 is very troubling.

17 I don't think that this case raises any
18 issues about the merits. I think this case is
19 ready for decision. And I think that frankly
20 the agency needs to be given like -- it's an
21 exceptional situation, but this is a case where
22 I believe, Your Honor, the Court has an
23 important role to play in upholding the rule of
24 law that applies not only to private citizens
25 but also to state agencies.

1 State agencies are not in a position to
2 rewrite statutes and they should comply with
3 them and that's what this hearing is all about.
4 I think the record is clear, what the facts are,
5 what the relevant case law, what the statutory
6 law is. And I think the sooner that we can
7 receive the Court's guidance as to how the law
8 should be interpreted and applied, not only by
9 private parties but by the state agency in
10 question, the better. So I thank you for your
11 time.

12 THE COURT: Thank you, Mr. Frink. Anyone
13 else?

14 MR. STILES: Justice Marden, good
15 morning. I will be brief. William Stiles
16 with -- on behalf of the Maine State Chamber of
17 Commerce.

18 I think it's important to realize why
19 we're here. And the question should be when can
20 an agency disregard a clear and unambiguous
21 statutory directive. And the reason that I'm
22 here today is because there seemed to be some
23 suggestion that the agency could not go forward
24 with its case by April 1. And to the extent
25 that the Court is under that misunderstanding or

1 misimpression, that they can't possibly --
2 couldn't possibly have met their obligation to
3 hold a hearing, let me shatter that myth.

4 The sole reason that they have given for
5 continuing this hearing is that cost reports,
6 medicare cost reports for hospitals with a
7 fiscal year that ends on 12/31 will not be
8 available until they are filed, which by
9 medicare law requires no later than five months
10 after the end of their fiscal year, so we're
11 talking about May 31st at the latest.

12 The DHA recently filed its methodologies
13 and it has identified only four initiatives for
14 this year. I believe that Mr. Ditte said
15 something about operating margins. That is not
16 one of the initiatives that they are pursuing
17 this year, there are only four. One is the
18 certificate of need. There is no certificate of
19 need information in any medicare cost report.
20 It is irrelevant to that issue.

21 He also -- the -- another issue is the
22 hospital or physician fee initiatives. This is
23 based on a time value of money. There is no
24 hospital physician fee initiative information in
25 a medicare cost report. And if you don't

1 believe me, you can look at their own
2 methodology, where they identify the date
3 elements necessary for that. They do not
4 identify medicare cost reports. So that leaves
5 only two. The cost per case mix adjusted
6 discharge issue and the bad debt charity care
7 savings initiative.

8 Now, there is a line in the medicare cost
9 report that covers bad debt and charity care.
10 However, in last fall's hearing, the agency
11 already captured all of the savings for calendar
12 year 2006, which is the exact same period
13 covered by the cost reports that they say they
14 need for the upcoming period. So it cannot be
15 relevant to bad debt charity care, they're
16 measuring 2006. We would have to wait until
17 June 1 of 2007 to get the relevant information.
18 And I would submit to you that the legislature
19 could not have intended to -- for them to use
20 information that could not possibly be ready by
21 the time they are supposed to issue their
22 decision.

23 So that leaves only the cost per CMAD.
24 This methodology in their -- in their recent
25 filing that identifies the methodologies for

<p style="text-align: center;">59</p> <p>1 year two, they say they are going to rely on the 2 year one methodologies. In year one they had a 3 spreadsheet with all of the hospitals costs in 4 there, starting with the fiscal year 2000, 5 ending with fiscal year 2004. There are 6 formulas in there that take the numbers from the 7 cost report and out comes a number that they say 8 is savings. 9 The only thing that they have to do is 10 add another column for 2005. There are only 11 eight of 36 hospitals in the State of Maine that 12 they are measuring that have a fiscal year that 13 ends on 12/31. All of the other cost reports 14 are available and have been available for some 15 time, yet they have not updated their 16 spreadsheet. 17 And we're not talking about sophisticated 18 maneuvering here. We are talking about data 19 entry. This is not something that takes a lot 20 of time. We're talking about cost reports. 21 According to their testimony from the last 22 hearing, there are data fields where they enter 23 certain data from a cost report, cost reports 24 are big and thick and confusing, however, they 25 are aligned by worksheets, worksheets A through</p>	<p style="text-align: center;">61</p> <p>1 3.5 percent on a -- when measured by a cost per 2 case mix adjusted discharge, and that's what I 3 referred to as CMAD. That voluntary limit 4 expired on June 30, 2004. The period that they 5 intend to measure starts July 1, 2004, and 6 extends to June 30, 2005. There is no voluntary 7 limit in the law to be measured, so there's no 8 reason to wait for medicare cost reports. 9 I would suggest to the Court in light of 10 the fact that although we have the spreadsheets, 11 we have over 90 percent of the data available, 12 there -- and they can either input proxy numbers 13 or leave numbers blank, that the real reason for 14 the continuance is that either they're 15 unprepared or they don't want to show us the 16 numbers and the calculations until they put all 17 of the numbers in there, because they may want 18 to change the methodology when they get the 19 actual numbers because it may not produce enough 20 savings. And again, if you don't believe me, 21 you can look at their own methodology. On page 22 9 of the methodology, they say that once we get 23 the numbers, we may have to make some 24 refinements to the methodologies. Your Honor, 25 either the methodologies are reasonable in and</p>
<p style="text-align: center;">60</p> <p>1 S, and columns and lines. And so for each data 2 entry, and they're only pulling maybe a half 3 dozen or 10 data entries from the cost report, 4 we know which line to go to, which number to 5 pull, and all you do is take that number and put 6 it in the cost report. 7 So these cost reports will become 8 available. The methodology that they're 9 producing, this formula, can be tested at a 10 hearing where almost 90 plus percent of the data 11 through 2005 is available. When we get before 12 the superintendent, the numbers will be 13 available, they just put them in. This is 14 exactly what happened at the superintendent's 15 hearing last year. We debated the numbers and 16 the superintendent based on his decision input 17 new numbers into the same spreadsheet. 18 What they're not telling you about the 19 cost per CMAD issue is that in the first year, 20 first assessment year, last fall's hearing, the 21 sole basis for including the CMAD savings was 22 because hospitals were covered by a voluntary 23 limit in the increase of cost. So that the law 24 asks providers out of the goodness of their 25 hearts to hold cost increases to no more than</p>	<p style="text-align: center;">62</p> <p>1 of themselves, which can be tested at a hearing 2 that could start on Monday, or they are not. 3 The only reason for the delay is to give them a 4 chance to change the methodologies to meet their 5 budgeting needs. Thank you. 6 THE COURT: Thank you. Mr. Gerrity. 7 MR. GERRITY: I'll be very brief, Your 8 Honor, and I'll try to bring this around if I 9 can, sort of back around the barn. 10 There -- there maybe isn't a member of 11 the Superior Court sitting who has more 12 appreciation for the legislative process than do 13 you. This bill -- 14 THE COURT: Appreciation is an 15 interesting word. 16 MR. GERRITY: Well, and I chose that word 17 carefully. I am sure you are aware that when 18 this statute was enacted in 2003, that didn't 19 happen in a vacuum. I was there, Mr. Ditre was 20 there, Anthem was there, everybody and his 21 brother was there. The legislature worked on it 22 for months and went through all the things we 23 have all experienced in a legislative action. 24 You know, there's real truth to the saying that 25 two things you don't want to see made are</p>

1 sausage and legislation.

2 The legislature made a decision and it
3 set a time frame in place, and it said by April
4 in 2003 we want the decision on what the
5 aggregate measurable cost savings are from the
6 Board. Well, then two years follow in which all
7 of that mechanism is put in place. It took time
8 to create the agency, to fund the agency, to get
9 human beings in the agency, to work out a
10 contract with Anthem to be its -- one of its
11 contracting partners, to do all the stuff
12 necessary to start.

13 Then in 2005, as almost inevitably
14 happens, they had to amend the statute.
15 Everybody showed up. Everybody argued.
16 Everybody bickered. A committee was set up to
17 work on it. And by golly, the legislature after
18 hearing all that came back and said, not only do
19 we want the decision in April, we want the
20 decision by April 1st.

21 Now, this is an agency that has a real
22 problem with appreciating the distinction
23 between itself and the legislature. It is the
24 legislature that gets to set these time frames.
25 It is the legislature that out of this whole

1 maelstrom of the public policy debate made that
2 decision and this agency has to respect it. Not
3 only has the agency not respected it, the agency
4 has said, the heck with it, we're not just going
5 to be late by a week or two or three, we want to
6 wait at least four and a half months to hold the
7 hearing, or give ourselves that much time to
8 hold the hearing, and then maybe wait another 30
9 days to render a decision. They can't do that.

10 And the only reason we're here is to ask
11 you to do one of two things. Either tell them
12 that because you missed the April 1st deadline
13 you're out of luck, wait until next year, or if
14 the Court chooses not to do that and interpret
15 the statute as less than absolutely mandatory,
16 but -- but somewhat directory, say to them, you
17 know something agency, April 1st did mean
18 something. You can't come in here with circular
19 logic that says because we made the decision to
20 not do something, that's a decision and
21 therefore we're not doing nothing, which is the
22 silliest argument I've ever heard. You tell
23 them, you don't get to ignore this. Go out, go
24 forth, do your business. And if you don't like
25 the result that comes down, then go right back

1 over to the state house and tell the Insurance
2 and Financial Services Committee and the speaker
3 and the president of the senate and the governor
4 this doesn't work, please fix it for us. But
5 don't let them establish their own rules of the
6 game completely in derogation of the statute.
7 Thank you.

8 THE COURT: Thank you. Ms. Wyman.

9 MS. WYMAN: I really have --

10 THE COURT: You tell Mr. Laubenstein that
11 he did you a big favor.

12 MS. WYMAN: I am so happy to be here,
13 Your Honor.

14 I don't even -- I'm -- I don't even
15 know where to start. I feel like we've waded so
16 far into merits that it really goes so far
17 beyond what this Court really can do today.

18 The -- if you read the recommended
19 decision that was adopted by the Board, it deals
20 with the issue. I do take offense to the
21 characterization of the Board as having ignored
22 the statutory deadline. It did not ignore the
23 statutory deadline. In fact it recognized that
24 it had to deal with that deadline. And it made
25 a determination that it could not properly do

1 the measurable cost savings determination
2 without the medicare cost reports that don't
3 come out until the end of June. It's all on the
4 recommended decision as adopted by the Board.
5 The Board is making a good faith effort to
6 interpret the statute and make it work.

7 They -- you know, with all due respect to
8 these guys sitting here, they would love to see
9 the agency forced to do measurable cost savings
10 on the data that it has now. This is not a
11 simple matter of plugging in numbers. This is
12 using numbers that have been -- that are part of
13 this third party report that represent 17
14 million dollars potentially in savings. To
15 suggest that somehow they ignore that and then
16 allow the superintendent of insurance, which
17 under the statute is only allowed to review the
18 determination made by the Board, not allowed to
19 do the fact finding, then the Board would not be
20 doing what it needs to do, which is to make sure
21 that this program works.

22 Now, I want to address one issue that the
23 Court had when -- the question that the Court
24 had, what is the penalty. If the Board fails to
25 act in a timely fashion, there will not be a

1 program -- there will not be any determination
2 of rate savings or anything, it will come --
3 there will be no rates determined for 2007. So
4 the Board has to act. And in the recommended
5 decision, it states that it has to -- to have
6 this hearing by August 15th, which gives the
7 parties enough time to respond to the
8 information that comes in on those medicare cost
9 reports.

10 THE COURT: But isn't that one of the
11 arguments for April 1st?

12 MS. WYMAN: Well, there's been a lot of
13 I'd like to call it testimony today about what
14 the legislature was thinking. There's nothing
15 in the record that indicates what that date
16 really meant. It is the agency and the Board's
17 decision that is -- that looked at that April
18 1st deadline and said it is directory, not
19 mandatory. They would love to have this Court
20 come in and second guess that.

21 Our argument today is that that issue has
22 been very thoroughly preserved for appellate
23 review after the case is over. And we have no
24 doubt that they will ask for -- for the Court to
25 review that decision. But it's not before --

1 it's not before the Court properly today. The
2 only issue before the Court today is whether --
3 and they do have the right to ask this Court to
4 look at that, is whether the nonfinal action on
5 the part of the Board to allow a continuance to
6 the agency, so that it can have the crucial
7 information it needs to do a determination,
8 the same information that it had last year when
9 it -- when it did this process and that it
10 needed last year to do a determination.

11 And on that point, Your Honor, I would
12 like to point out, they did -- last year they
13 did not have a decision from the superintendent
14 of insurance until October 29th. The process
15 moved forward and they apparently were able to
16 get their rates in place before the time they
17 needed. Now, I know they're saying how chaotic
18 it was and how horrible it was. We would love
19 the process to run smoother. There was a real
20 effort here on the Board's -- on the agency and
21 the Board's part to try to get this hearing held
22 before April 1st. They simply could not do it
23 without the information they needed, that will
24 not be available until it summer. And they will
25 hold a hearing as soon as they have that

1 information.

2 THE COURT: But you're telling me the
3 Board is saying that April 1st is an
4 impossibility, that it is a nullity, that you
5 cannot implement the statute.

6 MS. WYMAN: No, that's not what it's
7 saying. What the Board made a determination is
8 that that provision in the law was directory,
9 and that to the extent that they -- they
10 attempted to honor it, they did, but they could
11 not in order to be able to fully implement the
12 program as it was intended to be implemented.

13 THE COURT: Well, I guess that's my
14 question, ma'am. Isn't the Board saying they
15 can't implement the program with an April 1st
16 deadline? I mean is it going to be any
17 different next year or the information --

18 MS. WYMAN: They have to seek a
19 legislative solution. But in order to get a
20 cost savings for 2007, they simply must hold the
21 hearing after they have the medicare cost
22 reports in order to do a full -- to do the
23 determination accurately.

24 THE COURT: So if the legislature takes
25 no action, the same situation is going to be

1 created next year.

2 MS. WYMAN: I have no idea what the --
3 how the Board plans to deal with this on a long
4 term basis. It's been -- I will agree with
5 this. This has been a difficult statute to
6 implement from day one. It's extremely
7 complicated. These parties are still arguing
8 about the methodology from last year. There's
9 no question that the litigation around this will
10 swirl for years to come.

11 But to -- to deny the Board the right to
12 interpret the statute the way it believes it has
13 to in order to effect legislative intent, which
14 was to pass savings on to consumers, they can't
15 ignore their responsibility because of one date
16 in the statute.

17 THE COURT: But --

18 MS. WYMAN: And that's --

19 THE COURT: But getting back to my
20 question, ma'am. If as has been described to me
21 these medicare cost reports are not available
22 until May, hasn't the Board made its decision,
23 that under no circumstances can they reach a
24 decision by April 1st? And if there's no
25 legislative relief, then in effect the deadline

1 is a nullity.

2 MS. WYMAN: No, that's not what they
3 determined. In its decision it determined that
4 it would use the statutory date as a directory
5 date. And it followed the case law that said
6 that there are times when you have to look at
7 those dates and not determine that they are
8 mandatory, and that -- that they're
9 jurisdictional, and that's the position that the
10 Board took.

11 And with all due respect, Your Honor, I
12 don't even think that issue is before the Court.
13 I think it it's -- that issue clearly will be an
14 issue on appeal when it's final agency action.
15 So in essence that's it in a nut.

16 THE COURT: We're not talking about
17 grocery stores here, ma'am, we're talking
18 about --

19 MS. WYMAN: No, I understand, but what we
20 are talking about is if the Court were to force
21 the -- the Board to go forward, it would not
22 have the information that it needed in order to
23 do the measurable cost savings correctly, and it
24 would mean that the process would move forward
25 with faulty information, which I -- talk about

1 motives, perhaps that's a motive here, and then
2 it would result in few if any savings for the
3 consumers and that would not serve the program.
4 And that was the determination that the Board
5 made in -- in the -- for the benefit of the
6 program and for the consumers in Maine. And
7 the -- the agency and the Board are entitled to
8 some deference in how they interpret the
9 statute. Thank you, Your Honor.

10 THE COURT: Thank you. Mr. Ditre.

11 MR. DITRE: Your Honor, I just want to
12 sort of back up and really get to where we're
13 at, because the agency began its proceeding, it
14 had prefiled testimony, it had prefiled briefs,
15 all the parties have basically briefed the
16 issue, they provided proposed methodology for
17 calculating the savings, we've got designation
18 of witnesses, we've got expert witness and
19 prefiled expert testimony. So the agency began
20 to do what it could do.

21 Your question regarding the April 1st
22 deadline and will this recur every year, I would
23 posit possibly not. And it all hinges on a
24 factual determination that the Board has made in
25 terms of what data does it need. So, for

1 example, could it make a decision by April 1st
2 of next year? Absolutely. How would it do
3 that? It could possibly use trend factors
4 rather than actual data. It could say,
5 healthcare costs are going up by such and such
6 an amount, therefore we predict that as of next
7 year, we project for what those amounts would
8 be. This is not something that will occur, it
9 could. But in essence that could be fixed.

10 The second point is that when the
11 petitioners come before you and say, look what
12 happened last year, how the legislature had to
13 change the deadlines, yes, because at their
14 request, they filed a piece of legislation,
15 LD-1577, that the Insurance and Financial
16 Services Committee adopted, which did two things
17 that put off the dates. They at the request of
18 the insurance companies basically included a
19 savings offset payment working group that
20 convened on June the 30th and finished its
21 deliberations I think sometime at the end of
22 August. That pushed back the other dates. So
23 the committee actually -- the Insurance and
24 Financial Services Committee actually changed
25 the dates in the statute. If they wanted to

1 make this a mandatory deadline for this year and
2 all years forward, when they had that bill
3 before them they could have said, we're going to
4 impose some sort of penalty for not meeting this
5 date. They chose not to do that.

6 You heard one of the petitioners say they
7 changed it from April to April the 1st. Well,
8 if the legislature was so moved to change and
9 require that this had to be completed by April
10 the 1st, period, then they would have put a
11 hammer in the statute and said if you don't do
12 this, this is -- this is analogous to the case
13 that you just decided on the taxpayer
14 collection, in which you said there was no --
15 that the -- that the petitions were invalid,
16 that was the penalty in the statute if you went
17 beyond a year, they were invalid. Here they
18 didn't say that at all. They recognized that
19 this is a complicated proceeding and they left
20 it to the discretion of the agency. In fact in
21 addition, they gave all powers necessary and
22 convenient, were convenient to effectuate the
23 purposes of this act.

24 Why -- I mean the penalty, you've asked
25 that question several times, what is the

<p style="text-align: center;">75</p> <p>1 penalty? The penalty is that the entire purpose 2 of the Dirigo Health Agency, of providing 3 affordable, comprehensive, subsidized health 4 insurance, would be frustrated. In fact it 5 would be destroyed if they didn't make this 6 decision. There is no interest in the agency to 7 avoid making the decision here or to delay this. 8 THE COURT: So you're saying that the 9 savings offset for '06 would not automatically 10 trans -- become the savings offset for '07 if 11 there is no action under this statute? 12 MR. DITRE: If they don't -- if they 13 don't determine the savings offset payment this 14 year for next year for the assessment that will 15 fund the program next year, they will have no 16 money to basically provide -- except for any 17 money that carries over after this year ends. 18 THE COURT: So you're saying there would 19 be no assessment, you wouldn't -- you would not 20 continue with the assessment rate that has been 21 established for -- 22 MR. DITRE: Exactly. They have to do 23 this annually, Your Honor. Section 6913(1) 24 requires a -- that's 24-A, Title 24-A, Section 25 6913(1), requires annually to determine the</p>	<p style="text-align: center;">77</p> <p>1 medicare reports available to us, two of them 2 are among the largest hospitals. So it might be 3 a small number of hospitals but the amount of 4 money is huge. So it's -- it's not simple. 5 And I think that -- I guess what I'm 6 asking is that the agency has made a factual 7 determination that they needed more information, 8 and they did not abuse their discretion, there 9 is no abuse of discretion, that they have the 10 inherent authority and broad discretion, I mean 11 Volume II of American Jurisprudence Second 12 Edition 335 basically says administrative 13 agencies have inherent authority and broad 14 discretion in granting or denying motions to 15 continue. I don't think they abused their 16 discretion here. I think that they basically 17 are saying we need more information. And it's 18 not just the medicare cost reports. 19 THE COURT: Okay. Thank you very much. 20 MR. DITRE: Thank you. 21 THE COURT: Well, I asked if anybody 22 wanted more time to argue the merits and they've 23 argued the merits, which is fine. Mr. Roach, 24 you wanted to say something. 25 MR. ROACH: Yes, Your Honor, just very</p>
<p style="text-align: center;">76</p> <p>1 cost, the aggregate measurable cost savings and 2 then 6913, Sub 2, requires them to determine the 3 assessment after the superintendent makes his 4 decision. So yeah, there would be -- in essence 5 with the exception of any carry over of 6 remaining funds from this year, there would be 7 no funds for the subsidies for -- that enable 8 people to get the health coverage that they 9 need. 10 I think that in the interest of economy, 11 what the Board said was -- they made a factual 12 determination that they didn't have the 13 information. And I would disagree with the 14 characterization of how easy it is to basically 15 plug numbers into a data sheet. We had Mercer, 16 Governmental Human Services Consulting, a 17 worldwide consulting firm, we had Lewin 18 Worldwide Consulting, basically representing the 19 interests of each of the -- I think the Chamber 20 had Lewin and I think Dirigo Health Agency had 21 Mercer, they also had a world class financial 22 analyst basically involved in this. These are 23 not simple calculations. It's not like you can 24 plug numbers in. For example, of the nine 25 hospitals that they testified that was in the</p>	<p style="text-align: center;">78</p> <p>1 briefly, a couple of points. We've heard now, 2 Your Honor, for the first time, at least to my 3 knowledge, that they would be capable of making 4 this determination by April 1st if they use 5 different data, if they use trend factors. I 6 would posit the question why didn't they? If 7 that data is available, perhaps it's not crucial 8 that they have the medicare cost information 9 that they say they need. Secondly -- 10 THE COURT: I'm assuming he meant trend 11 data under this statute, which would mean -- how 12 old is it, one year? 13 MR. ROACH: It would have to be -- I 14 would assume it would have to be not trend data 15 of what the state's offset payment was but 16 rather trend data related to hospital costs, 17 which is all historical. It's the same -- it's 18 the same trend data that Anthem, for example, 19 uses in rate proceedings every year and is 20 not -- is not some newly crafted trend data. 21 The other suggestion is that -- that 22 again, it's been repeated last year we waited 23 until October 29th and Anthem got it into the 24 rates, got the SOP into rates. Again, I -- I 25 guess I have to repeat that Anthem had to get</p>

<p style="text-align: center;">79</p> <p>1 special dispensation from the -- from the notice 2 requirements within the statute to allow a 3 truncated notice period to policyholders. 4 The other piece that I would point out, 5 Your Honor, is that last year's Health Choice 6 rates were implemented in March. This is -- 7 this is not a process that occurs overnight, for 8 obvious reasons. We couldn't implement the 9 rates until March. They were effective January 10 1st. So Anthem was able to recoup a full 12 11 months worth of premiums, but they weren't 12 implemented until March. 13 Well, what's the practical outflow of 14 that? Every consumer that purchases Anthem's 15 individual products, which numbers in the range 16 of 35,000 Maine consumers, received a higher 17 monthly amount starting in March than they 18 otherwise would have, because if it had been 19 spread out over 12 months, the increase would 20 have been less. 21 That is certainly not what the 22 legislature envisioned in any of these 23 requirements for Maine insurance companies. 24 It's not a practice that the bureau certainly 25 appreciates. They would like the rates to be</p>	<p style="text-align: center;">81</p> <p>1 But there is a body of law in which the Law 2 Court has clearly set some considerations that 3 must be given as to whether or not the deadlines 4 in the statute are mandatory or directory and 5 whether or not that issue is -- is properly 6 before the Court. McGee of course was a 7 constitutional context which had its own 8 influence with respect to that decision. 9 It seems to the Court, without making a 10 decision at this stage of the game, that the 11 implication of 11,001, Sub 2, stands by itself, 12 except the standard must be whether or not the 13 failure to take action for reasons which have 14 been justified by the agency was for good and 15 sufficient reason and whether or not it affects 16 the legal rights -- whether it has an effect 17 over and above simply being a violation of a 18 procedural rule. 19 I -- I mention that at this point simply 20 to raise the possibility that if the Court is 21 satisfied from a further reading of the briefs 22 and the cases that that requires evidence, it 23 would be -- it feels it would be obligated to 24 have a -- have an evidentiary hearing. And so 25 just be aware that -- and there will be no delay</p>
<p style="text-align: center;">80</p> <p>1 effective on the date that they're implemented. 2 Any suggestion -- if the Court were to agree 3 that they can simply put off this hearing in the 4 way that they suggested, the same thing will 5 happen. The rates will not be implemented on 6 time, we'll have delays, and it's not in 7 accordance with the statute. 8 What we've heard them argue is this isn't 9 mandatory. There is no penalty. What I would 10 suggest to the Court is even if it's directory, 11 they are required to hold a hearing. That's 12 what the law requires, they haven't addressed 13 that, they should be ordered to hold a hearing 14 and make their determination. Thank you. 15 THE COURT: Okay. Anybody want to submit 16 any more writing or do we close it and a 17 decision be made? 18 MR. ROACH: None for Anthem, Your Honor, 19 unless we receive any -- any other writings that 20 we need to respond to. 21 THE COURT: Okay. The -- it was 22 interesting receiving this on top of the McGee 23 decision. And quite frankly, when I first 24 addressed the McGee decision, I thought it was a 25 slam dunk based upon Title 1 and Title 21-A.</p>	<p style="text-align: center;">82</p> <p>1 in making that determination if the Court feels 2 that there must be an evidentiary hearing to 3 determine those issues, it will put out a 4 scheduling order accordingly, and hopefully with 5 a status conference to determine availability 6 for all parties. I -- I recognize -- for the 7 very same reasons this action is here, promptly 8 filed after April 1st, the Court realizes that a 9 decision must be made in a timely fashion and it 10 will handle it accordingly. 11 With that, in spite of all of the 12 argument, it's really nice to see you all again. 13 It brings back some great memories. Court will 14 be in recess. 15 (10:12 A.M.) 16 * * * * * 17 18 19 20 21 22 23 24 25</p>

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CERTIFICATE

I hereby certify that the foregoing is a correct
transcript of my stenographic notes of the testimony
and proceedings taken in the above-captioned case.

Janette L. Cook
Official Court Reporter

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